North Dakota Law Review

Volume 40 | Number 1 Article 3

1964

Damages for Dry Hole Trespass

Herbert Qualls Jr.

DAMAGES FOR DRY HOLE TRESPASS

HERBERT QUALLS, JR.*

An oil and gas question that has long perplexed courts and legal writers is whether damages may be recovered for loss of market value of land for oil and gas purposes, caused by the drilling of a dry hole by a trespasser In this discussion damages for loss of market value of land for oil and gas purposes will be referred to as market value damages, and the drilling of a dry hole by a trespasser will be referred to as dry hole trespass.

The actual question has been decided in only three jurisdictions, two[1] allowing recovery and one[2] denying it. A division exists among the law writers with one group favoring recovery,[3] another opposing recovery[4] and a third suggesting that recovery should be allowed only if a specific offer for lease or purchase can be shown.[5] A similar division exists among the authors of student notes in the law reviews with notes favoring[6] and opposing[7] recovery and in an intermediary position.[8] Thus, there is considerable authority on either side.

Market value damages should not be confused with damages for the actual physical injury caused by the dry hole trespass, for it is well settled that the landowner may recover for loss of cattle, breaking of gates and fences, cutting of trees, driving of heavy vehicles on the land, drilling of the

---

* LL.B., University of New Mexico. LL.M., New York University School of Law. Assistant Professor, Oregon State University

1. Humble Oil & Ref. Co. v. Kishi, 276 S.W 190 (Tex. Com. App. 1925), *modified*, 291 S.W 538 (Tex. Com. App. 1927) Matheson v. Placid Oil Co., 212 La. 807, 33 So. 2d 527 (1947).

2. Martel v. Hall Oil Co., 36 Wyo. 166, 253 Pac. 862 (1927).

3. KULP, OIL AND GAS RIGHTS § 10.9 (1954) MCCORMICK, LAW OF DAMAGES § 44 (1935) Walker, *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEXAS L. REV. 125 (1928).

4. SUMMERS, THE LAW OF OIL AND GAS § 25 (1954) THORTON, THE LAW OF OIL AND GAS § 59 (1932) Green, *What Protection Has a Landowner Against a Trespass Which Merely Destroys the Speculative Value of His Property?*, 4 TEXAS L. REV. 215 (1926).

5. Williams and Meyers, *Adverse Possession and Trespass in the Law of Oil and Gas*, 29 ROCKY MT. L. REV. 1 (1956).

6. Notes, 11 CORNELL L.Q. 416 (1926) 11 WYO. L.J. 109 (1957).

7. Notes, 48 HARV. L. REV. 485 (1935), U. ILL. L.F 631 (1958) 36 YALE L.J. 1167 (1927).

8. Note, 1 WYO. L.J. 123 (1947).

hole and other physical damages done by the trespasser.[9] However, these damages are seldom substantial, generally not exceeding a few hundred dollars, while the market value damages may be thousands of dollars.

The leading case allowing recovery of market value damages for dry hole trespass is *Humble Oil & Ref. Co. v Kishi.*[10] Kishi was the owner of the surface and of a three-fourths undivided interest in the oil and gas in a fifty acre tract in Orange County, Texas. On December 23, 1919, he executed an oil and gas lease, bearing that date, to Humble Oil & Refining Company which was signed and acknowledged by his co-tenant, Lang, on January 29, 1920. The lease provided for a primary term of three years and contained the usual clause which extended the life of the lease "so long thereafter" as oil or gas should be produced in paying quantities.

No operations were begun before the expiration of the lease, and Humble, with full recognition that the lease had expired, unsuccessfully bargained with Kishi for a new lease. In January, 1923, oil was discovered on adjoining land, and Humble, claiming that the lease had not expired, re-entered the land with Lang's permission to drill. Kishi protested the re-entry, and after commencement of drilling, delivered a written demand that Humble vacate the land. Humble, however, remained in possession until the well, a dry hole, had been completed.

There was evidence that an oil and gas lease of Kishi's land would have commanded a cash bonus of from $750 to $2,500 per acre at the time of the trespass, but there was no showing that Kishi had an opportunity to lease or would have accepted an offer

The District Court found that Humble was a trespasser, but denied Kishi relief, stating that damages were "highly speculative, remote, and contingent" The Court of Civil

9. Matheson v. Placid Oil Co., 212 La. 807, 33 So. 2d 527 (1947) Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So. 2d 20 (1946) Tidewater Associated Oil Co. v. Shipp, 59 N.M. 37, 278 P.2d 571 (1954) Wilson v. Texas Co., 237 S.W.2d 649 (Tex. Civ. App. 1951), Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 Pac. 255 (1925).

10. 276 S.W 190 (Tex. Com. App. 1925), *modified,* 291 S.W 538 (Tex. Com. App. 1927).

Appeals reversed and remanded, conditioning recovery upon Kishi's ability to prove an offer and his willingness to accept. The Commission of Appeals of the Supreme Court reversed both lower courts and remanded, holding that "the exclusive right to enter upon the land, drill wells thereon and remove therefrom the oil to exhaustion" was a "property right which the law protects" without the showing of an offer and a willingness to accept.

Texas courts have had occasion to comment on the *Kishi* case and have always stated that it remained "good law" [11]

In the second case allowing market value damages for dry hole trespass, *Matheson v Placid Oil Co.*,[12] the Mathesons, who owned a 160 acre tract in Grant Parish, Louisiana, granted an oil and gas lease to Mitchell. The primary term was three years, but a clause provided that if Mitchell failed to drill within ninety days the lease would terminate. Mitchell breached the condition, and the lease terminated; but, nevertheless, he assigned to Grandstaff. Grandstaff began operations and assigned to Placid Oil Company which completed the well as a dry hole.

The Mathesons claimed damages for the loss of the cash bonus and royalty interest and for physical injury to the land. The District Court allowed only market value damages equal to the cash bonus. Apparently neither the litigants nor the Louisiana Supreme Court were aware of the controversy over market value damages, as that portion of the lower court's decision relating to market value damages was affirmed with no discussion of either the merits or the authorities. The court's attention was primarily directed to whether the awarding of market value damages precluded, in the same action, the allowance of damages for physical injury to the land. The court found that it did not and gave the plaintiffs damages for the physical injury There was no consideration of the claim for market value damages based upon the royalty interest.

---

11. Jarrett v. Ross, 139 Tex. 560, 164 S.W.2d 550 (1942) Humble Oil & Ref. Co. v. Wood, 294 S.W 197 (Tex. Com. App. 1927) Humble Oil & Ref. Co. v. Luckel, 154 S.W.2d 155 (Tex. Civ. App. 1941) McCoy v. Texon Royalty Co., 124 S.W.2d 877 (Tex. Civ. App. 1939).

12. 212 La. 807, 33 So. 2d 527 (1947).

The contrary result was reached in *Martel v Hall Oil Co.*[13] Barquin, owner of a tract of land in Wyoming, executed an oil and gas lease in 1915 which was assigned to the Hall Oil Company In 1917 Barquin executed a mineral deed, which included oil and gas, to Martel. Barquin notified Hall that he considered Hall's lease void, but Hall refused to grant a release. Whereupon Barquin brought suit for cancellation, obtaining a favorable judgment in 1919. During the litigation Hall contracted with Midwest Oil Company to drill on the land. Midwest, over the protest of Martel and Barquin, entered and drilled a dry hole.

Martel brought this second action against Hall and Midwest to recover market value damages for the dry hole trespass. The District Court directed a verdict for the defendants which was affirmed by the Wyoming Supreme Court with the modification that nominal damages be given, because interference with the exclusive right to drill was a "technical violation of the rights of the plaintiff" The Supreme Court primarily rested its decision on damages being "speculative," a word to which it unwittingly attributed two meanings.

The court first found that damages were "speculative," meaning difficult or impossible of ascertainment, because of five facts:

1. Though a government oil reserve was one-half mile away, it had yielded no production.
2. The cash bonus value of lands in the oil reserve ranged from $25 to $265 per acre.
3. No actual sales of oil rights in the reserve had taken place the year of the trespass.
4. The nearest producing well was two miles from Martel's land.
5. There was no evidence of the production of this well.

After determining that the market value was uncertain or "speculative," the court asked, "Does such speculative

13. 36 Wyo. 166, 253 Pac. 862 (1927).

value furnish any basis for damages in favor of plaintiffs?" Although the question should have been answered "yes," because difficulty in ascertaining the amount is no reason to deny damages;[14] or "no," because the amount was not shown with sufficient certainty;[15] the court abruptly changed its definition of "speculative" from an uncertain value to a market value obtained by "some wild speculation or the prevalence of a gross error," and denied substantial recovery because "there is other, more satisfactory, evidence of the actual value" - the actual value of the oil and gas located under the land.

It has been suggested[16] that *Martel* is not incompatible with *Kishi* and that Wyoming would follow *Kishi* if presented with a comparable fact pattern, but this seems unlikely The Wyoming court, which could have distinguished *Kishi* and rested its decision on the uncertainty of the market value, chose to decide on the broader ground that there was nothing to protect. The court stated: "We are cited to the case of Humble Oil & Refining Co. v Kishi (Tex. Com. App.) 276 S.W 190, decided in 1925. The case is exactly in point, but, with all due respect to the eminent court that decided that case, we cannot agree with its reasoning, and we think that the court overlooked some of the fundamental principles here pointed out, that should govern a case of this kind."

The question of whether damages are appropriate for loss of market value of land for oil and gas purposes has arisen in three other factual situations than dry hole trespass. An examination of these cases indicates that courts have generally been willing to allow recovery of such damages:

1. With the exception of an older case,[17] courts have awarded damages for loss of market value of land for oil and gas purposes caused by the clouding of title to land by the defendant while oil and gas operations on adjoining property depreciated oil and gas values

14. First-Citizens Bank & Trust Co. v. United States, 76 F Supp. 250 (Ct. Cl. 1948).
15. Wilhelm Lubrication Co. v. Brattrud, 197 Minn. 626, 268 N.W 634 (1936).
16. Note, *Another Look at the Martel Case*, 11 WYO. L.J. 109 (1957).
17. South Penn Oil Co. v. Stone, 57 S.W 374 (Tenn. Ch. App. 1900). Plaintiff could have executed an oil and gas lease for $15,000 if defendant had not clouded the title by obtaining an injunction. Plaintiff was refused recovery, because the court considered the lack of oil and gas, not the injunction, to be the proximate cause of her injury.

by indicating that the land would not be productive of oil or gas,[18] particularly where the injured party could show the loss of an opportunity to make an oil and gas lease.[19]

2. Damages have been allowed for loss of market value of land for oil and gas purposes caused by unauthorized conduct by trespass of geophysical operations on the land which indicated that it would not be productive of oil or gas.[20] Recovery has not been permitted in cases where plaintiff failed to show a bona fide loss.[21]

3. The market value of land for oil and gas purposes has been considered in fixing the value of that land for condemnation proceedings, even though the land might not actually contain oil or gas.[22] It is easier, however, to permit a recovery based on oil and gas value in this type of situation where it has not actually been determined that the land contains no oil or gas.

The *Martel* case, which disallowed market value damages for dry hole trespass, and those authorities who approve of the decision cite these seven substantial reasons in support of their position. Each of these seven is followed by a critical examination by this writer.

1. *Damages are too uncertain to assess, as market*

---

18. American Sur. Co. v. Marsh, 146 Okl. 261, 293 Pac. 1041 (1930). Plaintiff was allowed damages for loss of market value of land for oil and gas purposes caused by the drilling of a dry hole on adjacent property while defendant held plaintiff's land, pending unsuccessful appeal of a lower court decision that plaintiff had a valid lease.

19. Hunt Oil Co. v. Berry, 86 So. 2d 7 (Miss. 1956). Plaintiff was awarded damages for loss of chance to make an oil and gas lease covering part of land whose title was wrongfully clouded by defendant, but was denied damages for loss of market value for oil and gas purposes of the remaining portion of the land, as the court felt such damages were "too uncertain and indefinite" Solberg v. Sunburst Oil & Gas Co., 76 Mont. 254, 246 Pac. 168 (1926). Plaintiff was allowed damages for loss of chance to make an oil and gas lease because of negligent failure of defendant to publish a declaration clearing the record of a valid, though no longer binding, instrument. Kidd v. Hoggett, 331 S.W.2d 515 (Tex. Civ. App. 1959). Plaintiff was awarded damages for loss of chance to make an oil and gas lease because of claim of defendant that defendant's lease had been maintained by shut-in-gas clause although defendant's well was, in fact, not capable of producing gas in paying quantities.

20. Angelloz v. Humble Oil & Ref. Co., 196 La. 604, 199 So. 656 (1940). Recovery of $7,500 allowed.

21. Thomas v. Texas Co., 12 S.W.2d 597 (Tex. Civ. App. 1928). Appellant " offered no evidence showing that this trespass proximately resulted in the loss of the market value of his property."

22. Cal-Bay Corp. v. United States, 169 F.2d 15 (9th Cir. 1948) Eagle Lake Improvement Co. v. United States, 141 F.2d 562 (5th Cir. 1944) United States v. 31,221.07 Acres of Land, 143 F Supp. 385 (D.C.W.D. La. 1956).

value of oil and gas properties cannot be accurately determined.[23]

In areas where oil and gas are produced, land has an approximate market value for this purpose. This value, which ranges from very little or nothing to thousands of dollars per acre, is determined primarily by the concensus of the oil community as to the probability and extent of oil or gas.[24] Other determinative factors include geographic location, proximity to a pipe line or other transportation facility, the general level of wholesale and retail prices in the industry, the outlook for the industry, and the national economic picture.

Although market prices for oil and gas land contain a strong element of volatility, a court can determine the market value of a particular tract at a particular time with the help of company landmen, independent operators, local speculators, and others who qualify as oil and gas experts.

If difference of opinion exists among the experts as to value, the court can fix a reasonable figure after hearing the testimony In the *Kishi* case four persons testified that the market value of the cash bonus per acre was respectively $2,500, $1,500, $1,000 and $750. The trial court found the value to have been $1,000 per acre. Regardless of whether the court considered that all of these were Kishi's witnesses or whether it discarded the top figure as being excessive, and selected $1,000 as the median of the remaining three, the result seems reasonable.

To require a landowner, who has been injured by a trespasser's admitted misconduct, to prove exact damages is unjust. Uncertainty as to the measure or extent of damages is not sufficient to bar recovery [25] Indeed, there is authority that if damages are uncertain the wrongdoer should pay the largest reasonable sum.[26]

---

23. Martel v. Hall Oil Co., *supra* note 2.

24. Walker, *Fee Simple Ownership of Oil and Gas in Texas,* 6 TEXAS L. REV. 125, 136 (1928).

25. Conley v. Amalgamated Sugar Co., 74 Ida. 416, 263 P.2d 705 (1953) Sol-O-Lite Luminating Corp. v. Allen, 223 Ore. 80, 353 P.2d 843 (1960) Kowing v. Williams, 75 S.D. 454, 67 N.W.2d 780 (1954), 25 C.J.S. DAMAGES § 28 (1941).

26. Independent Commercial Printers, Inc. v. Atkinson, 136 Wash. 628, 241 Pac. 2 (1925).

2. *This interest does not merit protection because the oil and gas rights were actually valueless.*[27]

This reasoning strikes at the oil industry's acquisition methods, the oil and gas lease and the sale of the oil and gas estate (in an ownership in place state) or the exclusive right to take the oil and gas (in a non-ownership state) If this interest in property which lacks oil and gas does not merit protection against a trespasser, then a landowner who leases or sells oil and gas rights in land which does not contain these minerals has given no consideration and should not be entitled to retain money paid him for the conveyance.

The present method of leasing oil and gas properties without actual knowledge of the oil or gas within has proven beneficial both to the industry and to landowners. It permits oil companies to obtain adequate reserves without requiring immediate drilling, and provides landowners reasonable development with just compensation for delay This leasing system does not limit compensation to those lessors whose land produces, but gives some return to all in cash bonuses, royalty interests and delay rentals. The *Martel* approach may not threaten this method of acquisition, but it is unrealistic and inconsistent with oil and gas development theory

The idea that land has no oil or gas value because subsequent events show there was actually no oil or gas present is a basic misconception.[28] Anyone interested in acquiring an oil and gas property knows that it may be barren, and this primarily determines its market value. If an intelligent oil and gas speculator or an oil company wishes to lease oil and gas land for X dollars, well knowing that it may contain no oil or gas, why should not a wrongdoer who has taken the property with the same knowledge and for the same purpose, depriving the owner of a chance to realize on it, pay X dollars in damages! What better indication is there of value at any given time than actual market value —

27. Martel v. Hall Oil Co., *supra* note 2 Green, *What Protection Has a Landowner Against a Trespass Which Merely Destroys the Speculative Value of His Property?*, 4 TEXAS L. REV. 215, 222 (1926) Notes, 48 HARV. L. REV. 485 (1935), 36 YALE L.J. 1167 (1927), 1 WYO. L.J. 123 (1947).

28. Walker, *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEXAS L. REV. 125, 136 (1928).

the amount an informed oil and gas businessman in an equal bargaining position would be willing to pay

One authority[29] suggests an analogy in which "a contestant was prevented by wrongful conduct of defendant from realizing on his chance for a prize of supposedly great value, but which in fact was without value, or a case in which there was in fact no prize at all" This analogy is inaccurate because the landowner did not have a supposedly valuable prize of no actual value, but had a valuable interest to sell, the nature of which was clearly recognized by potential purchasers and which would have brought him a good price regardless of the oil or gas content.

Though the oil and gas market value be destroyed by dry hole trespass, there is no certainty that the property does not actually contain oil or gas which could be produced by drilling deeper or on another part of the land.[30] For example, in the Oklahoma City oil fields the first well drilled was a dry hole, and ten years passed before large quantities of oil were discovered by deeper drilling.

3. *There is no "theory of action" on which to base recovery* [31]

Summers, feeling that facts must present "a well defined theory of action" before damages should be allowed, considers these possibilities:

a) ejectment or trespass to try title

b) trespass quare clausum

c) slander of title

d) disparagement of quality or value of property

He states that:

"If the plaintiff in the Kishi case had a well defined theory of action it does not appear in the pleadings or in the opinion. In the pleadings he merely sets out the facts of the trespass, the depreciation of the

29. Green, *op. cit. supra* note 27.
30. KULP, OIL AND GAS RIGHTS § 10.9 (1954).
31. SUMMERS, THE LAW OF OIL AND GAS § 25 (1954) Green, *op. cit. supra* note 29.

> market value of a lease of his interest and the court permitted a recovery upon proof of the market value of his undivided interest. The steps by which the court reasoned to this conclusion are as follows: The plaintiff's rights and privileges respecting the oil and gas in his land constitute a property interest which the law protects; the defendant's entry upon the land claiming privileges of producing oil and gas therefrom amounted to a trespass and a violation of the plaintiff's rights; the property interest of the plaintiff in the oil and gas had a market value which was destroyed or depreciated by the defendant's act; the damages for the defendant's wrongful act should be measured by the depreciation in the market value of plaintiff's property interest "

To demand a "well defined theory of action" is contrary to the ideals of modern pleading, as expressed in the Federal Rules of Civil Procedure, which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief,"[32] and in the Texas Code which calls for " a concise statement of the cause of action, and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain his suit. "[33] Texas defines a cause of action as a fact or facts entitling one to institute and maintain an action which must be alleged and proved to obtain relief.[34]

To require a "theory of action" or "theory of the pleadings"[35] is to hamstring modern pleading with remnants of the common law forms of action and of common law pleading which serve no functional purpose. Let the case be determined on its merits.

4. *To allow market value damages when no oil is discovered is inconsistent with the damages allowed when a small amount of oil is produced by a trespasser* [36]

This is remindful of the famous doctrine of *Flureau v*

32. Rule 8(a)(2).
33. VERNON'S TEXAS STAT. ANN. ART. 2003 (1950).
34. A.H. Belo Corp. v Blanton, 133 Tex 301, 129 S.W.2d 619 (1939).
35. See Armacost v. Lindley, 116 Ind. 295, 19 N.E. 138 (1888) Martin v. Smith, 214 Minn. 9, 7 N.W.2d 481 (1942) Anderson v Case, 28 Wis. 505 (1871).
36. Martel v. Hall Oil Co., *supra* note 2 SUMMERS, THE LAW OF OIL AND GAS § 25 (1954).

Thornhill[37] which established the exception to the general rule of damages that in a contract for the sale of land if the vendor is incapable, without fraud, of giving a good title, the vendee cannot recover for the loss of the bargain. *Flureau v Thornhill* has been criticized as "not so fully stated nor so completely reasoned as would be desirable",[38] but is still followed, because the measure of damages conforms to the rule of damages where an action on the covenants of title is brought against a vendor who conveyed land he did not own.

It is an anomaly to restrict the vendee to the recovery of a lesser sum when an ineffectual deed is given but allow a larger recovery when the vendor, who discovers the infirmity of his title, informs the vendee and declines to execute a worthless deed. A more sensible solution would be to examine the doctrine of *Flureau v Thornhill,* to determine that compensatory damages are desirable and then to re-examine and adjust damages allowed for willful breach of covenants for title. It is illogical to deny damages because of conflict with a malfunctioning rule.

Similarly, market value damages are incompatible with damages allowed, the oil and gas produced with no allowance for costs, when a willful trespasser produces a small quantity of oil or gas. However, rather than disallowing market value damages because of the conflict with an established rule of oil and gas law, it is reasonable to search for the more equitable result.

If it is desirable to give a landowner market value damages for dry hole trespass, it is certainly as desirable to compensate him to the same degree for the same loss when the trespasser produces a small amount of oil or gas. There is no reason to limit compensation to production. The rule that a willful trespasser pay damages of all oil and gas produced with no deduction of costs was formulated to dis-

37. 2 Wm. Bl. 1078, 96 Eng. Rep. 635 (1776).

courage wrongful drilling and to provide a harsh penalty for it. When the trespasser produces a limited amount, he should not be permitted by a defect in this rule to avoid the result of his trespass, the partial or complete destruction of the market value of the land for oil and gas purposes.

A preferable result is obtained by allowing market value damages for a dry hole trespass or for a willful trespass which results in limited production of oil or gas, allowing the trespasser to set off production against the loss in market value. As production increases, the loss of market value decreases, and from the point where the two lines intersect, damages will equal the amount of production.

5. *There may not be a permanent loss of market value, as oil or gas may be produced by deepening the well or by drilling at another location.*[39]

Though receiving little attention by legal writers, this is an interesting contention. Why, indeed, compensate for the loss of market value when there is no certainty that the loss is permanent? A stronger case could be made in support of this contention if the later discovery of oil or gas upon lands where a dry hole has been drilled were less of a rarity, but where it is almost certain that damages lie, they cannot be avoided upon the basis of a mere mathematical possibility

6. *During a controversy over the mineral estate, oil or gas may be drained by wells on adjacent land, while litigants hesitate to offset the drainage for fear of drilling a dry hole which by ultimate determination they had no right to drill.*[40]

This objection, while having validity, presents an unlikely situation, especially today with our well-spacing regulations. For the case to arise, drainage by a well on adjoining land and a dispute over ownership of oil and gas rights must simultaneously occur The dispute must be real and the uncertainty genuine, because if either of the parties is reasonably certain that he has a valid lease or deed, he will

38. Hammond v. Hannin, 21 Mich. 373 (1870).
39. Martel v. Hall Oil Co., *supra* note 2.
40. SUMMERS, *op. cit. supra* note 31.

drill rather than suffer drainage. Furthermore, if substantial drainage were likely to occur the controverting parties would probably agree before extensive damage were done to pro rate the responsibility and cost of drilling.

7 *There is no necessity for market value damages, as ordinary prudence will deter an oil operator from drilling on another's land.*[41]

This is a punitive or deterrent, not a compensatory damage theory Considering market value damages as compensatory, this objection begs the question, for even though a prudent operator would not ordinarily drill on another's land, we need a measure of damages to compensate the mineral estate owner if this does happen. It is no answer to say that it occurs infrequently

---

As indicated in the consideration of these seven objections to market value damages for dry hole trespass, this writer feels that market value damages are the correct measure. Oil and gas ownership is a property right which deserves the sanction and protection of society The right is not merely speculative, but has a market value. The landowner's loss is his opportunity to sell or lease a valuable commodity—the exclusive right to explore for oil and gas which commands its price irrespective of the actual presence of minerals.[42]

The purpose of compensatory damages is to place the aggrieved party in the same financial position he would have been in had his rights not been violated. To obtain this optimum result, however, the property right should not be protected in all cases of dry hole trespass. Perhaps it would be helpful to call it a "qualified property right" as opposed to an "absolute property right"

The landowner should be denied market value damages for loss of cash bonus if he intended to develop the property himself, because if he had drilled, he would not have received a cash bonus and he would have expended money which has been saved by the trespass. To give him damages would be

41. Martel v. Hall Oil Co., *supra* note 2.
42. KULP, *op. cit. supra* note 30.

to give him a windfall. However, the burden of proof as to the landowner's intention belongs on the trespasser, because he is the admitted wrongdoer and if there is no evidence either way, the landowner should be entitled to a presumption that he would have leased. Generally, landowners sell or lease their mineral estates rather than developing the land themselves, and while it is possible that the landowner might have refused to lease or sell at the time of the trespass, the chances are that he would have leased or sold while oil and gas interest in the land was so high that the trespasser deemed it desirable to drill.

If the property was held by an oil company or a speculator at the time of the dry hole trespass, compensation should be given if a sale, lease, or assignment was planned, but not if the land was to be developed. A presumption could be raised by examining the holder's past operations.

In considering damages for loss of the 1/8 (or other fractional) royalty interest, the burden of proof should belong on the landowner There is first the possibility that the landowner would have developed the property, and therefore gained by the trespass. Secondly, if the landowner leased, there is the probability that he would have been content with his "bird in the hand," the cash bonus, and his "birds in the bush," the royalty interest, feeling that he had gotten some cash, regardless of oil or gas discovery, and stood a chance for a large return through his royalty interest. The courts in the dry hole trespass cases have not considered that the royalty interest has a market value and may be sold; however, if the owner can show intent to sell, this is a real basis for damages.

Although willingness to lease or sell oil and gas rights is a desirable requisite for recovering market value damages, there is a valid reason for not requiring proof of a specific offer The land on which the trespasser wrongfully drilled was in his possession or being claimed by him before he drilled. During this time no prudent operator would have offered the actual lease or sale value, if anything, because

he would have been "buying a lawsuit" along with oil and gas.[43]

The writer suggests that the above is a practicable and equitable solution to the question of damages for dry hole trespass.

43. Solberg v. Sunburst Oil & Gas Co., 76 Mont. 254, 246 Pac. 168 (1926) KULP, *op. cit. supra* note 30.